LIBRARY
Supreme Court, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 968

WORZ, Inc., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

MID-FLORIDA TELEVISION CORP., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT

ELLIS C. LOUGH
Attorney for Petitioner
734 Fifteenth Street, N. W.
Washington 5, D. C.

October 20, 1968

Press of Byron S. Adams, Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 349

WORZ, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

MID-FLORIDA TELEVISION CORP., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT

A brief in opposition to the petition for a writ of certiorari herein was filed only by the Federal Communications Commission. In the conclusion it notes that the Commission has instituted an inquiry into the proceedings wherein petitioner's application for television facilities at Orlando, Florida, was denied and that of Mid-Florida Television Corp. was granted. This inquiry is motivated by testimony appearing in

the Transcript of Hearing (pp. 957-965) before the House of Representatives Subcommittee on Legislative Oversight.* This testimony showed that, two days before the Commission issued instructions to its staff to prepare a decision granting the Mid-Florida application, an Orlando friend of then Commissioner Richard A. Mack privately interceded with the latter on behalf of Mid-Florida and strongly in opposition to petitioner. These instructions were in disregard of the Examiner's lengthy Initial Decision which was largely supported by record references and favored petitioner for 12 reasons, giving Mid-Florida not one point of preference. Thus this case must be deemed

---

* The Commission's "Notice of Inquiry", adopted October 1, 1958, captioned "In the Matter of Inquiry into alleged *ex parte* representations in a Commission adjudicatory proceeding involving mutually exclusive applications for Channel 9 in Orlando, Florida", and given Docket No. 12,618, reads as follows:

> "The Commission has before it the record of Hearings before the Subcommittee on Legislative Oversight of the House of Representatives Committee on Interstate and Foreign Commerce. This record makes reference to an alleged *ex parte* representation regarding the qualifications of an applicant for a contested television channel in Orlando, Florida, made while the matter was in an adjudicatory status. While a final decision has been rendered in the proceeding (In re Applications of WORZ, Inc., Mid-Florida Television Corp., Dockets Nos. 11081, 11083, 22 FCC 1254) the Commission has instructed its staff to institute an inquiry into the matters raised before the Subcommittee on Legislative Oversight as they may bear on this case. This action is being taken on the Commission's own motion pursuant to the authority vested in it under Section 403 of the Communications Act of 1934, as amended (47 U.S.C. 403). The Commission will report the results of its inquiry and will take such further action as in its judgment appears appropriate at that time."

There was a footnote reference to the pendency of the petition for a writ of certiorari.

to be very much out of the ordinary and to be worthy of special attention. To that end petitioner not only replies to the opposition brief but also suggests that this Court may want to defer consideration of the petition pending the outcome of the inquiry instituted by the Commission.

1. As to the first question raised by the petition, the Commission contends that there was "no showing that the Court below failed to review the entire record". The lower court failed to say enough in its *per curiam* opinion to indicate just what it reviewed. Its statement (Appx. 1a), "After reviewing appellant's contentions, we find no basis for disturbing the Commission's award", would indicate that review was limited to appellant's *contentions;* it does not say that the whole *record,* or any part of it, was reviewed, and surely such review may not be implied. The single illustration cited by petitioner (Pet. p. 9, fn. 8) shows that the lower court did not bother with the *whole* record any more than did the Commission. The petition was certainly not the proper place to recite numerous detailed and cumulative portions of the record in support of the fact that the lower court "misapprehended or grossly misapplied", to use the language of this Court in *Universal Camera Corporation v. National Labor Relations Board,* 340 U. S. 474 at 491, the standard governing judicial review of administrative findings as set forth in the latter case.

2. As to the second question raised by the petition, the Commission complains that reliance is placed "on part of one sentence in the Commission's 95-page decision" to show that the Commission *prejudged* one of the issues that had been inserted against petitioner and thus precluded the possibility of a fair hearing. The

Commission contends that this claim was not properly made a ground of appeal because it had not been raised before the Commission, citing Section 405 of the Communications Act, 47 U. S. C. 405, and *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33.

Of course, prejudgment may be evidenced by a paragraph, a sentence, or by only a few words. The important consideration is the significance of the words used. Here the Commission stated in its conclusions (R. 302) that "the existence of completely inadvertent errors would not have led to the inclusion of a special issue and the questioning of WORZ's character qualifications." This, according to petitioner (Pet. 13), constituted an admission that the Commission's collective mind was made up in a manner adverse to WORZ as to that special issue *at the time it was adopted.* It is submitted that such a preconceived intention is not a question of fact or law on which the Commission must have an opportunity to pass under the provisions of Section 405 of the Communications Act. It may not even be said that the Commission had no opportunity to pass upon the propriety of its preconceived intention. It must have given the matter considerable thought and become convinced that it had a perfect right to insert the special issue in question even though it had already made up its mind as to how it would decide that issue.

Under the circumstances, a petition for reconsideration following the release of the decision could have accomplished only one purpose—it would have given the Commission an opportunity to express itself *more discreetly,* to rephrase its statement so as *not to disclose the fact that it had been guilty of prejudging the issue.* Such an opportunity is comprehended neither

by any rule of reason nor by the *Tucker Truck Lines* case, supra, in which there was involved the question of whether there could properly be raised, for the first time on appeal, an objection to the appointment of the hearing examiner. This Court held that the lower court erroneously entertained the objection, that (at pp. 35-36) the grounds for the objection could have been ascertained long before the record was closed, that there was no suggestion of bias, favoritism, or unfairness, and that the objection was clearly an afterthought based upon "technical compulsion irrespective of considerations of practical justice." Obviously, such a situation is entirely unlike that presented here by proof of *prejudgment* which, *for the first time*, became known to petitioner, the unsuccessful applicant, *when the Commission's final decision was released.*

The inquiry which has been instituted by the Commission into the proceedings which are here the subject of review may well significantly change the circumstances surrounding the controversy; it may even render moot the instant petition for a writ of certiorari. As noted by this Court in *Scripps-Howard Radio, Inc. v. Federal Communications Commission* (1942), 316 U. S. 4, 9, "No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during an appeal, despite anything a court can do" and (at p. 10) "judicial review would be idle ceremony if the situation were irreparably changed before correction could be made."

Accordingly, in the interest of ultimate justice with the minimum demand upon the time of this Court, pe-

titioner suggests that consideration of its petition be deferred pending the outcome of the Commission's inquiry into the same subject matter.

Respectfully submitted,

ELIOT C. LOVETT
Attorney for Petitioner
734 Fifteenth Street, N. W.
Washington 5, D. C.

October 20, 1958